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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THEODORE ROBINSON, SR.,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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For Petitioner

ORAL ARGUMENT REQUESTED

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30 pp

QUESTIONS PRESENTED FOR REVIEW

I.

The decision of the United States Court of Appeals, Eleventh Circuit, which held that utilization of a F.L.I.R. ["Forward Looking Infrared Radar"] Device is not sufficiently intrusive as to constitute an illegal, warrantless search and seizure; is patently erroneous and contravenes judicial authority established by this Honorable Court and other United States Courts of Appeal, as well as the precepts of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

II.

The decision of the United States Court of Appeals, Eleventh Circuit, which held that the facts within the knowledge of the authorities at the time of the issuance of the search warrant for his residence were sufficient to constitute valid "probable cause" requisite to the issuance of the search warrant; is patently erroneous and contravenes judicial authority established by this Honorable Court and other United States Courts of Appeal, as well as the precepts of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

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REFERENCE TO LOWER COURT OPINIONS

EXHIBITS

EXHIBIT "A"

Exhibit "A" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order of the district court entered April 10, 1992; denying Petitioner's 3/20/92 Motion To Suppress as amended 3/26/92. References to this document shall be designated as "A".

EXHIBIT "B"

Exhibit "B" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order of the district court entered July 1, 1992; denying Petitioner's 6/5/92 Motion To Suppress. References to this document shall be designated as "B".

EXHIBIT "C"

Exhibit "C" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Judgment and Commitment Order rendered by the district court on November 3, 1992. References to this document shall be designated as "C".

EXHIBIT "D"

Exhibit "D" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the Order issued on August 31, 1995, by the United States Court of Appeals, Eleventh Circuit; affirming the judgment of the district court. References to this document shall be designated as "D".

EXHIBIT "E"

Exhibit "E" contained in the Appendix to Petitioner's Petition For Writ Of Certiorari [Volume II] is the 11/20/95 Order of the United States Court of Appeals, Eleventh Circuit; denying Petitioner's Application For Rehearing. References to this document shall be designated as "E".

No. _____

IN THE

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October Term, 1996

THEODORE ROBINSON, SR.,
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vs.

THE UNITED STATES OF AMERICA,
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On Appeal From the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The Decision of the United States Court Of Appeals, Eleventh Circuit, affirming the judgment of the district court was rendered on August 31, 1995. The Decision of the United States Court Of Appeals, Eleventh Circuit, denying Petitioner's Application For Rehearing was rendered on November 20,

1995. Jurisdiction to review the judgment of the lower court by Writ of Certiorari is vested in this Honorable Court pursuant to Title 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

This case involves the fundamental proscription against warrantless search and seizure afforded to the citizenry of this country and set forth in the provisions of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.**

The **Fourth** Amendment of the **UNITED STATES CONSTITUTION** states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the **UNITED STATES CONSTITUTION,** through its provisions, makes applicable to the States the pronouncements of the Fourth Amendment as follows:

> "Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On February 25, 1992, an Indictment issued by the Grand Jury was unsealed and a warrant was issued for the arrest of Your Petitioner, Theodore Robinson; charging him with Manufacturing and Possession With Intent To Distribute Marijuana, in violation of Title 21 **U.S.C.** §841(a)(1), Aiding and Abetting in the Manufacturing and Possession With Intent To Distribute Marijuana, in violation of Title 21 **U.S.C.** §841(a)(1) [Count I] and Using and Carrying Firearms During and In Relation To a Drug Trafficking Crime, in violation of Title 18 **U.S.C.** §924(c)(1). Pursuant thereto, Petitioner Robinson entered a plea of "Not Guilty" on March 10, 1992.

On March 20, 1992, Petitioner filed a Motion To Suppress and Request For Oral Argument on the merits of same and a Precautionary Motion To Suppress Evidence

Obtained By a Warrantless Search and Seizure and Request For Oral Argument on the merits of same with the district court. On March 26, 1992, Petitioner filed with that court an Amended Motion To Suppress and an Amended Precautionary Motion To Suppress Evidence Obtained By A Warrantless Search And Seizure. On March 27, 1992, Petitioner submitted a Memorandum of Law In Support of the Motion To Suppress to the district court.

On April 7, 1992, a Hearing was held on Petitioner's Motion To Suppress (D.S.6). On April 10, 1992, the trial court issued an Order in which Petitioner's Motion To Suppress was denied. (Exhibit "A").

On June 5, 1992, Petitioner, filed a Motion To Suppress with the district court. This motion was denied on July 1, 1992. (Exibit "B").

On August 7, 1992, Petitioner entered a conditional plea with the court; pursuant to Rule 11(a)(2), *Federal Rules of Criminal Procedure*, pleading "guilty" to Counts I and II of the indictment against him.

On October 26, 1992, Petitioner, being duly represented by counsel, appeared before the court for sentencing in the case at bar. In issuing judgment, the district court ordered, *inter alia*, that Petitioner be sentenced to 130 months in the custody of the United States Bureau of Prisons and to

supervised release for a period of four years upon release therefrom. (Exhibit "C").

On October 26, 1992, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on the Order issued April 10, 1992, denying his Motion To Suppress. On November 10, 1992, Petitioner filed a Notice of Appeal to the Eleventh Circuit Court of Appeals regarding the Orders issued on April 10, 1992, and August 6, 1992, in which the district court denied all Motions To Suppress.

Petitioner is currently on release pending disposition of this appeal.

STATEMENT OF THE FACTS

Charles West was the Alabama Bureau of Investigation ("ABI") agent in charge of the search and seizure of Petitioner's home. A few days prior to Christmas, 1991, he received information that 30 high pressure sodium lights were shipped from a company in California to the residence of the Petitioner. The supplying company is a legitimate supplier of equipment for hydroponic supplies. The lights that were shipped are the type used to light city intersections, as well as for indoor growing of various plants and vegetables; including African violets, roses and tomatoes. It was admitted by the Government that the purchase of these lights was not, in itself, indicative of illegal drug activity.

Pursuant only to the foregoing information, West initiated a criminal investigation regarding Petitioner. West instructed members of the National Guard to conduct an aerial surveillance of Petitioner's home using an F.L.I.R. [forward looking infrared radar detector], in order to observe the amount of heat emanating from Petitioner's home. Several surveillances were conducted on January 8, 1992, at 2:30 a.m. and 6:30 a.m. and on January 17, 1992, at 2:30 p.m. and videotapes were made of the infrared images. However, there was no meter or gauge which provided a reading for comparison of Petitioner's home with others in the area. West did not participate in the actual surveillances, but simply reviewed the tapes. He had no specialized training in the area of F.L.I.R., but asserted that he was able to discern a differentiation between the heat emanating from Petitioner's home and the other homes on the tape. Yet, when asked why he conducted multiple surveillances, West stated that he was unable to get sufficient heat readings.

With only the foregoing information, West met with Bullock County, Alabama, District Judge Emfinger on January 30, 1992, at approximately 2:45 p.m. and secured a search warrant for the residence of the Petitioner.

On January 31, 1992, West secured a subpoena for the records of electricity usage at Petitioner's residence. These

records reflected that the average bill for electricity used at the home of Petitioner was approximately $400.00 a month and in December, 1991, the amount billed was $562.00. Petitioner's home is approximately 4200 square feet in size.

Additionally, on January 31, 1992, at approximately 10:00 a.m., West and other agents executed the search warrant issued by Judge Emfinger and conducted a search of Petitioner's residence. Photographs taken while the search was conducted revealed that members of the National Guard assisted in that search. West acknowledged at the hearing that members of the National Guard were specifically prohibited from actively participating in the enforcement of state laws.

At the suppression hearing, Timothy Slaughter was called as an expert witness. Mr. Slaughter is a veteran avionics technician with the United States Navy and an expert in the field of F.L.I.R. technology. He explained the methodology of the F.L.I.R. stating: "*If the target is [sic] in the picture is one that is emitting a lot more heat than the others, it will be at a stronger intensity.*" However, in reviewing and analyzing the F.L.I.R. video tapes shot during the surveillances of Petitioner's home on January 8, 1992, and January 17, 1992, Slaughter was unable to distinguish Petitioner's home as emitting any more heat than the surrounding homes.

Slaughter stated that any significant differentiation in heat emanations among the homes in that area would be easily recognizable to someone with his training.

On April 10, 1992, the district court issued an Order denying Petitioner's Motion To Suppress. (Exibit "A"). In this order, *inter alia*, the court held:

> 1. The use of an F.L.I.R. (forward looking infrared radar detector) by law enforcement without defendant's knowledge, consent or a valid search warrant did not constitute a violation of Petitioner's Fourth Amendment protection as it was not so intrusive as to constitute a warrantless search;
>
> 2. The participation of the National Guard in the search of Petitioner's home did not violate the *Posse Comitatus Act*, Title 18 **U.S.C.** §1835 and the evidence seized was not subject to the exclusionary rule; and
>
> 3. The statements contained in the affidavit supporting the issuance of the search warrant constituted probable cause. "

On June 5, 1992, Petitioner filed a Motion To Incorporate By Reference All Motions Previously Filed By Defendant and a Motion To Suppress "any and all statements made

by [the Defendants], either written or oral, to any law enforcement officers". On August 6, 1992, a hearing was had on this Motion To Suppress. At the conclusion of the proceeding, the Government rested and the court denied the Motion To Suppress.

ARGUMENT

I.

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE THE USE OF AN F.L.I.R. [FORWARD LOOKING INFRARED DETECTOR] WAS SUFFICIENTLY INTRUSIVE AS TO CONSTITUTE AN ILLEGAL, WARRANTLESS SEARCH AND SEIZURE IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The first issue presented to this Honorable Court by Petitioner is whether the warrantless utilization of an F.L.I.R. [forward looking infrared radar detector] by law enforcement personnel during aerial surveillance of a suspect's home, in order to visualize heat emanations escaping from that home; is sufficiently intrusive as to constitute an unreasonable "search and seizure" in violation of the proscription against warrantless searches inherent in the Fourth and Fourteenth Amendments of the **UNITED STATES CONSTITUTION.**

The Fourth Amendment of the **UNITED STATES CONSTITUTION** specifically provides:

> " The right of the people to be secure in their persons, houses, papers and

> effects, against unreasonable searches and seizures shall not be violated..." [emphasis added].

SOLDAL V. COOK COUNTY, ILL., 113 S.Ct. 538, 121 L.Ed.2d 450, *on remand,* 986 F.2d 1425, *on remand,* 1993 WL 199050 (U.S. Ill. 1992). Therefore, in the absence of a search warrant, the invasion of this constitutionally protected arena is presumptively unreasonable. **UNITED STATES V. RIEDESEL,** 987 F.2d 1383 (C.A.8 [Iowa] 1993 and **KATZ V. UNITED STATES,** 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Since the enactment of the Fourth Amendment, rapidly expanding technological advances have forced this country's judiciary to accept an expansion of the concept of "government invasion" and revisit prior decisions related thereto. Now, not only must the courts examine purely physical intrusions to determine if there has been an infringement of this constitutional protection, but must closely scrutinize non-physical "invasions" as well. For, as was stated in **UNITED STATES V. SOLIS,** 536 F.2d 880 (9th Cir. 1976);

> "The use of sophisticated, modern, mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and a broadening of protection to cover a reasonable expectation of privacy."

It has been held by this Court that an "expectation of privacy" is reasonable where; (1) the individual manifests a subjective expectation of privacy, and (2) society is willing to recognize that subjective expectation as reasonable. **OLIVER V. UNITED STATES,** 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Clearly, the citizenry of this country has a right to a "reasonable expectation of privacy", in whatever emanations originate from the interior of a home, whether atmospheric, electronic or thermal, after reasonable efforts to contain same have been made. For, it is an expectation of society, generally accepted and well within reason, that the general populace not be subjected to arbitrary and capricious surveillance by law enforcement, through the use of electronic technology to detect personal preferences and lifestyles within their homes, including heating and cooling; in order to merely satisfy the curiosity of governmental agents.

In the present matter, ABI agent West ordered the warrantless, aerial surveillance of Petitioner's home conducted and the F.L.I.R. films taken of thermal images derived from Petitioner's home and others adjacent thereto. This search was conducted solely pursuant to information which the Government admits was, standing alone, an insufficient predicate to a reasonable presumption of criminal activity. Albeit, West did attempt to bolster justification

for this warrantless search through the procurement of the records of electricity usage at Petitioner's home. Although West compared records of Petitioner's home which is approximately 4200 square feet in size with homes of approximately 2800 square feet and he presented no consideration of extraneous contributory factors such as number of occupants, type and usage of appliances, time of year, average versus actual billing, etc.; he deemed these records to indicate that the electrical usage at Petitioner's home was excessive when compared to the usage in the other homes. Based on this assumption, West concluded that a "drug related illegal activity" must be responsible for the purported disparity. Most importantly, however, it should be noted that these records were not obtained until thirteen (13) days *after* the last surveillance was conducted. Therefore, it is averred that the utilization of these records to justify the aerial surveillance and search of Petitioner's home through the use of infrared radar devices is tantamount to an impermissible "closing of the barn door" after the departure of the proverbial horse: completely ineffective and without substance or force. In **UNITED STATES V. MITCHELL,** 951 F.2d 1291 (C.A. D.C.1991) it was held:

> "The Court must look to objective circumstances in determining the legitimacy of police conduct under the Fourth Amendment, rather than the

> officer's state of mind [at the time the officer engages in such conduct]" (emphasis added).

It is self-evident that the aerial surveillance of Petitioner's home by governmental agents and the use of the F.L.I.R. to detect and seize film thermal images of any heat emanating therefrom, particularly where evidence derived therefrom was ultimately used to obtain a criminal conviction, was sufficiently intrusive as to constitute a "search and seizure". Accordingly, where no search warrant was obtained prior to conducting these surveillances, such conduct can only be deemed to be unreasonable and unlawful, as it clearly contravenes the dictates of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION**. It is well settled that:

> "The Fourth Amendment, with few exceptions, protects citizen's right to privacy by prohibiting police from conducting searches or seizures without first obtaining warrant issued upon probable cause; to give effect to the Fourth Amendment's guarantee against unreasonable searches and seizures, and to deter illegal police conduct, the court must apply the exclusionary rule and suppress any evidence unconstitutionally obtained."

UNITED STATES V. DONNES, 752 F.Supp. 411, *reversed* 947 F.2d 1430 (D. Wyo. 1990) and **UNITED STATES V. MAXWELL,** 738 F.Supp. 1043, *clarified* 734 F.Supp. 280 (S.D.Tex. 1990).

II.

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS WHERE THERE WAS INSUFFICIENT PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF A SEARCH WARRANT FOR HIS RESIDENCE.

The second issue presented to this Honorable Court by Petitioner is whether law enforcement personnel and the issuing magistrate were possessed of facts sufficient to constitute "probable cause" at the time that the search warrant was issued authorizing the search of Petitioner's residence and the seizure of evidence from therein; as warrants predicated on facts insufficient to constitute requisite probable cause are *per se* unreasonable and violative of the mandates of the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION.** In accordance therewith, all evidence seized pursuant thereto, or derived therefrom is inadmissible and subject to suppression under the exclusionary rule as "fruits of the poisonous tree".

Indiscriminate and unreasonable searches and seizures by law enforcement officers are proscribed by the **Fourth** Amendment of

the **UNITED STATES CONSTITUTION.** which specifically provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated..." and no warrants shall issue, but *upon probable cause* supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added).

A police officer must have more than a "particularized hunch" or a "mere suspicion" in order to intrude upon a citizen's constitutional rights. **BRINEGAR V. UNITED STATES,** 338 U.S. 160 (1949) and **UNITED STATES V. HARRIS,** 928 F.2d 1113 (C.A.11,1991). Although facts may provide reasonable suspicions which warrant further investigation, such suspicions do not rise to the level of "probable cause"; **UNITED STATES V. DIMICK,** 990 F.2d 1164 (C.A.10 [Col.] 1993).

In order for a search warrant to be lawfully valid, it may be issued only upon a finding of probable cause. **UNITED STATES V. DANIEL,** 982 F.2d 146 (C.A.5 [Miss.] 1993); **MAPP V. OHIO,** 367 U.S. 643 (1961) and **UNITED STATES V. CORRIGAN,** 809 F.Supp. 567 (M.D. Tenn. 1992). In **UNITED STATES V. CONLEY,** 813 F.Supp 372 (W.D.Pa. 1993), the standard for determining the existence of "probable cause" sufficient to justify

issuance of a search warrant was set forth as follows:

> "Probable cause for searching a particular place exists in an affidavit when the affidavit sets forth facts constituting a *substantial basis* for finding fair probability that first, a crime has been committed; and, second, the particular place may contain fruits, instrumentalities, or evidence of the crime committed." (emphasis added).

The search warrant for Petitioner's residence was issued by the district court judge of Bullock County, Alabama, on January 30, 1992. *At the time of issuance of the warrant,* the agent requesting the warrant was possessed of the following facts only:

1. Petitioner had ordered some sodium lights from a legitimate supplier of hydroponic supplies in California. This type of light is the kind used by municipalities to illuminate street intersections and is also used for the indoor growing of certain plants, including roses and tomatoes. By West's own admission, purchase of this type of light was not indicative of criminal culpability; and

2. Three aerial surveillances of Petitioner's residence had been

> conducted by members of the National Guard. West was not present. During these surveillances, heat emissions from Petitioner's home and several other homes were captured on video tape. No attendant meter, or gauge readings were available. West, who provided only evidence of limited training and experience [attended one school, participated in two operations] in the field of F.L.I.R., admitted that multiple surveillances were conducted because he was unable to get sufficient heat readings. Yet, he asserted that he was sufficiently able to discern a notable differentiation in the amount of heat emanating from Petitioner's home in relation to the other homes.

It should be noted that this assertion was refuted by Timothy Slaughter, a veteran avionics professional with the United States Navy and an expert in the field of F.L.I.R., who testified that there was no discernible difference between the heat emanations from the various homes, including Petitioner's, captured on the videotape. Moreover, the evidence purportedly contained in the records of electricity usage was not obtained until *after* the issuance of the search warrant in question.

Therefore, unquestionably, when viewed objectively, the facts in possession of

agent West **at the time he requested the search warrant** for Petitioner's home constituted nothing more than a particularized hunch or mere suspicion of criminal activity on the part of Petitioner. They provided no *substantial basis* for believing that Petitioner had committed a crime, or that evidence of criminal activity existed in that location. Moreover, this assertion is plainly evidenced by West's attempt to bolster the underlying justification for issuing the search warrant and conducting the search of Petitioner's home by attempting to secure additional support through the records of electricity usage at Petitioner's home. Therefore, where the search warrant for Petitioner's home had no substantive basis in fact at the time it was obtained, it was illegal and all evidence obtained pursuant thereto is due to be excluded from consideration. In **UNITED STATES V. MOORE,** 956 F.2d 843 (C.A.8 [Neb.] 1992), it was held;

> " If state officers seize evidence in violation of the Fourth Amendment... the evidence **must be excluded** in [any] resulting federal prosecution." (emphasis added).

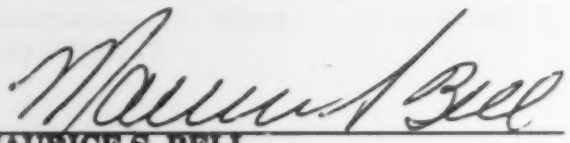
Dispositive of this issue is the decision rendered in **UNITED STATES V. KILGUS,** 571 F.2d 508 (1978) (citation omitted). In **KILGUS,** supra, the defendant was charged with, *inter alia,* the illegal importation of marijuana and possessing marijuana with the intent

to distribute. The primary evidence offered by the Government was the F.L.I.R. film results. In **KILGUS,** as is evidenced in the case at bar, the appellate court found that the officer who offered the F.L.I.R. results had no particular training or understanding of the use and operation of the equipment and there was no evidence offered to show constancy, of atmospheric conditions which affect the results of the F.L.I.R., between the three, individual surveillances conducted. Therefore, the F.L.I.R. evidence was ruled inadmissible and the defendant's conviction was overturned.

In accordance with the foregoing, it is readily apparent that the decision of the appellate court in the present case is in diametric opposition to decisions rendered by other United States Circuit Courts and the United States Supreme Court, as well as the fundamental constraints set forth in the **Fourth** and **Fourteenth** Amendments of the **UNITED STATES CONSTITUTION** and therefore, is due to be reversed.

CONCLUSION

COMES NOW, YOUR PETITIONER, Theodore Robinson, Sr., by and through counsel, and respectfully moves this Honorable Court, to grant this Petition For Writ of Certiorari and to proceed under its rules to review the matters complained of. Furthermore, Petitioner moves this Honorable Court to reverse the judgment of the Eleventh Circuit Court of Appeals and direct that court to reverse the judgment of the United States District Court for the Middle District, Northern Division, of Alabama, and remand with instructions to enter a Judgment of Acquittal; or, in the alternative, grant Petitioner's Motion To Suppress and grant Motion For New Trial.



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REQUEST FOR ORAL ARGUMENT

COMES NOW YOUR PETITIONER, Theodore Robinson, Sr., by and through counsel, and respectfully moves this Honorable Court to grant Oral Argument with respect to the issues contained herein. In support of this request, Petitioner avers that determination of these issues will be of considerable importance to the interests of the citizens of the State of Alabama, the citizenry of the United States and the general public as a whole. Furthermore, the complexity and novelty of said issues raises certain judicial inquiry; a proper resolution of which requires oral argument to sufficiently explain certain facets of the case.

Respectfully Submitted this the 20th day of February, 1996.

MAURICE S. BELL
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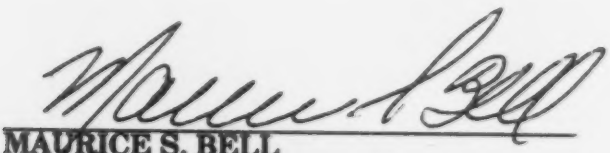
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable Redding Pitt, United States Attorney, and the Honorable Terry Moorer, Assistant United States Attorney, Middle District of Alabama, United States Attorney's Office, 1 Court Square, Suite 102, Montgomery, Alabama, 36104, by placing same in the United States Mail, postage prepaid, addressed as above, to their last known address, on this the 20th day of February, 1996.



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